

DATE: May 22, 1990

TO: Peter W. Hirsch, Regional Director  
Region 4

FROM: Harold J. Datz, Associate General Counsel  
Division of Advice

560-7540-4020-5033

SUBJECT: Teamsters, Chauffeurs, Warehousemen and  
Helpers Local 401  
(Kay Wholesale Drug Co., Inc.)  
Case 4-CC-1877

This Section 8(b)(4) case was submitted for advice on the issue of whether the purported neutral employer is a struck work ally of the primary employer.

#### FACTS

Kay Wholesale Drug Co., a wholesale distributor of pharmaceuticals and beauty care products, operates a warehouse in Wilkes-Barre, Pennsylvania. Hilbon Inc., a trucking company, delivers products from the Kay Wilkes-Barre warehouse to retailers. Kay and Hilbon, conceded to constitute a single employer, and collectively hereinafter called the Employer, employ employees represented by the Union, who, before the strike, performed normal distribution functions: they unloaded incoming trucks operated by various carriers and received the goods, warehoused the goods, picked the goods from stock, loaded trucks, and delivered the goods to the retailers. During the process they performed the paperwork associated with receiving: they counted incoming packages against the shipping documentation and recorded shortages, overages and damaged packages, and they marked packages to identify them for picking and delivery.<sup>1</sup> Finally, the Employer uses certain specialized techniques to store the goods. Thus, certain of the pharmaceuticals must be stored in refrigerators. Some of the pharmaceuticals are controlled substances which must be stored under lock and key.

---

<sup>1</sup> The Employer has an advanced technology for marking the packages. The receiving employees place bar coded stickers, which a nonunit employee had previously prepared, on the packages.

On November 6, 1989, the parties' last collective-bargaining agreement expired. On December 4, 1989, the Union commenced a strike, and picketed the warehouse. Common carriers' employees refused to cross the picket line and bring deliveries to the warehouse. The Employer accordingly contracted with Biscontini, a public warehouse, to receive the goods the Employer would, but for the strike and picketing, have received at its own warehouse. The Employer contracted with Austin Truck Rental, a trucking company whose employees are unrepresented, to bring the merchandise from the Biscontini warehouse to the Employer's warehouse. Employees of the carriers then brought packages to the Biscontini dock, and unloaded their trucks. Biscontini employees then conducted a piece count to insure that the number of packages delivered corresponded with the driver's records. They documented shortages and overages. They collected the packages from the various shipments at a single location within the warehouse. Unlike the Kay employees, however, they did not insure that the types of goods delivered corresponded with the common carrier's documents, they did not affix bar codes to the merchandise, and they did not use any of the specialized storage techniques used by the primary. With two exceptions when goods remained on the Biscontini premises overnight, the goods remained on Biscontini premises for relatively short periods of time. When an Austin truck arrived, the Biscontini employees loaded the packages destined for the Employer onto the Austin trailer, and prepared an appropriate bill of lading. When the Austin truck reached the Employer's warehouse, the Employer's personnel performed all the unloading, receiving, and warehousing functions that the striking employees performed before the strike. Biscontini played no role in the delivery of the goods from the Employer's warehouse.

By letter dated December 14, the Union informed Biscontini that by performing work which the Employer would have performed but for the strike, namely receiving and signing for goods, Biscontini had become the Employer's ally. The Union threatened that the Union would picket as long as Biscontini served as "receiving agent" for Kay. The Union also threatened to distribute to truckdrivers a leaflet which claimed that Biscontini had become the Employer's ally, in that Biscontini receives and signs for the goods and holds them until a Kay driver picks them up, and which asks the truckdrivers not to make any deliveries to the Biscontini warehouse.<sup>2</sup> On December 15, 1989, the

---

<sup>2</sup> On December 15th the Employer wrote the Union disputing the Union's assertion that Biscontini was its ally.

Union began picketing the Biscontini warehouse, with signs stating that "Kay-Unfair" and "Kay and Biscontini-Unfair." The picketing closed down the Biscontini terminal. The picketing at the Biscontini warehouse was not limited to times when Austin employees were on the premises. Thereafter, Biscontini terminated its relationship with the Employer, and the Union ceased to picket at the Biscontini situs.

#### ACTION

We concluded that complaint should issue, absent settlement, alleging that the Union, by threatening to picket, and by picketing at the Biscontini premises, induced employees of neutral employers to withhold services, and coerced neutrals with an object of forcing them to cease doing business with the Employer, in violation of Section 8(b)(4)(i)(ii)(B). In our view, Biscontini was not a struck work ally of the Employer.

Congress intended by the enactment of the secondary boycott provisions of the Act to "shield[] unoffending employers and others from pressures in controversies not their own." <sup>3</sup>. Accordingly, the Board has implemented Section 8(b)(4)(B) by enjoining labor organizations from putting economic pressure on genuinely neutral employers. However, where an employer is attempting to avoid the economic impact of a strike by securing the services of other employers to do his work, economic activity by a union directed against such employers is not unlawful under the Act. As stated in Tennessee Coal, <sup>4</sup> if the purported neutral "engages in conduct which is inconsistent with his professed neutrality in the dispute such as [knowingly] performing farmed-out struck work of the primary employer..., the third party employer ha[s] abandoned his 'neutral' status and laid himself open to economic pressure by the union."

However, mere assistance by the neutral to the primary employer does not cause the neutral employer to lose its neutral status. Thus, for example, in Fein Can, <sup>5</sup> the Second Circuit, enforcing, noted that even assuming that the neutral leased automobiles and drivers to carry nonstriking employees of the primary employer between the plant and a

---

<sup>3</sup> Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 146, 156 (1983).

<sup>4</sup> United Steelworkers of America, AFL-CIO (Tennessee Coal & Iron Div.), 127 NLRB 823, 824-825 (1960), *enfd.* as modified 294 F. 2d. 256 (D.C. Cir. 1961).

<sup>5</sup> Local 810, Steel, Metal, Alloys (Fein Can Corp.), 131 NLRB 59 (1961), *enfd.* 299 F. 2d 636 (2d Cir. 1962).

railway station, there was no ally relationship, because the neutral did not do struck work. Similarly, in Priest Logging,<sup>6</sup> the neutral did not lose its neutral status by storing logs produced by a third party during the strike at the primary employer's sawmill. The ALJ, whose recommendations the Board adopted, reasoned that the ally doctrine involves employers who perform work for a strikebound employer where it appears that such work would necessarily aid the latter in breaking the strike. However, the acceptance of the logs for temporary storage did not aid the primary employer in the conduct of any business activity constituting the reason for the latter's existence, and did not deprive the striking employees of any work opportunities they were legitimately interested in preserving. The unloading work performed by the neutral's employees as an incident of storage did not supplant or take away unit work, and therefore did not constitute struck work. Finally, in Sterling Drug,<sup>7</sup> the Board found a warehouse not to be a struck work ally, but rather a genuine neutral employer. There, Sterling, the primary employer, operated a manufacturing plant and warehouse. Before the union struck and picketed, it received 80% of its deliveries by truck, 20% by railroad, and stored the shipment for later use. The union there struck and picketed Sterling, preventing deliveries by truck but not by the railroad. Sterling contracted with Vogel, a warehouse, to receive the deliveries. Vogel unloaded the incoming trucks, transferred the goods to railroad cars, and the railroad delivered the goods to the primary. Vogel stored goods only until they filled a railroad car. At the Sterling plant, Sterling employees unloaded the cars. The union picketed Vogel with signs naming Sterling. The Board found that Vogel was not a struck work ally of Sterling. Vogel did not perform struck work because employees of the primary continued to unload the goods at the primary's plant.

In the instant matter, as in Sterling Drug, the unit employees performed, and during the strike nonstriking employees continued to perform, distribution functions: unloading incoming trucks; receiving and warehousing goods; picking the goods from stock; loading trucks, and delivering the goods to the retailers. They performed, and continued to perform, the paperwork associated with receiving: checking incoming packages against the shipping documentation and recording deviations and damaged packages; and marking packages to identify them for picking and

---

<sup>6</sup> Western States Regional Counsel No. 3 IWA (Priest Logging), Inc., 137 NLRB 352 (1962), *enfd.* 319 F. 2d 655 (9th Cir. 1963).

<sup>7</sup> Chemical Workers Local 61 (Sterling Drug Co.), 189 NLRB 60 (1971).

delivery. They used, and continued to use, specialized techniques to store some of the goods. On the other hand, Biscontini, the public warehouse, performed much more limited functions, more properly characterized as those of a conduit than those of a distributor: its employees received packages unloaded by the carriers' employees; conducted a piece count of the packages; recorded shortages and overages; and collected the packages from the various shipments at a single location. When an Austin truck arrived, the Biscontini employees loaded the packages destined for the Employer onto the Austin trailer, and prepared an appropriate bill of lading. Unlike the Kay employees, they insured that the types of goods delivered corresponded with the driver's documents; did not affix bar codes to the merchandise; and did not use any specialized storage techniques.

We recognize that there are some similarities between this case and some cases in which the Board found that the purported neutral lost its neutrality and became an ally, such as MacMillan Science Co.<sup>8</sup> Thus, in MacMillan, the primary employer operated a warehouse at which it received, stored, repacked a certain percentage of goods it received, and shipped. Before the strike, the Postal Service and United Parcel Service together made about 85% of the deliveries to the primary. Drivers, rather than unit employees, unloaded the goods. However, as to the remainder of the deliveries, employees employed by the primary performed about 60% of the unloading of shipments. Before the strike, the Postal Service and United Parcel Service together made about 95% of the pickups from the primary. These drivers loaded their own trucks. However, as to the remainder, unit employees did about 70% of the loading. During the strike, the primary contracted with Race, a public warehouse. As to shipments to the primary employer, the incoming carriers unloaded at Race. A Race driver brought the goods directly to the primary premises. Nonstriking employees of the primary there unloaded the goods. As to shipments from the primary, the Race driver picked up merchandise there. Some of the goods went to the terminals of the common carriers, and some to the Race warehouse, where Race employees loaded the trucks of the common carriers. When goods inbound to, or outbound from, the primary were left at the Race terminal, they stayed there usually for a day, but sometimes for as long as a week. The Board concluded that Race was performing struck work and was therefore an ally. The basic work of the

---

<sup>8</sup> Warehouse, Mail Order Employees, Local 743 (MacMillan Science Co.), 231 NLRB 1332 (1977).

primary was unloading, warehousing and loading. During the strike, Race performed the work of unloading, warehousing and loading. The duplication of work at the primary premises did not prevent the work from being struck work because, but for the picketing, all the work would have been done by employees of the primary employer.

Nevertheless, the facts here more closely resemble those of Sterling Drug<sup>9</sup> than they do of MacMillan. Thus, Biscontini, unlike the ally in MacMillan, did not play a major role in the delivery and warehousing of Kay's goods. In this regard, unit work in the instant matter involves the receiving of goods, which includes insuring that the types of goods delivered correspond with the shipping document, the unpacking and the affixing of bar codes to the goods, and the specialized storage of the goods. With respect to the above functions, Biscontini only receives the goods by doing a piece count and keeps the goods only a short while before they are sent to Kay. Thus, employees of the primary continued to perform normal unit functions during the strike and the functions that the Biscontini employees performed did not cause the unit to lose any work. Accordingly, it cannot be said that the work performed by Biscontini was work that had been farmed out to it.

H.J.D.

---

<sup>9</sup> See also General Teamsters Local 959 (Odom Corporation d/b/a Alaska Cold Storage), 266 NLRB 834 (1983).